In the Matter of the Compensation of
RANDY G. SIMI, Claimant
WCB Case No. 21-03791
ORDER ON REVIEW
Ronald A Fontana PC, Claimant Attorneys
Sather Byerly Holloway - SBH Legal, Defense Attorneys

Reviewing Panel: Members Curey, Ceja, and Wold. Member Curey dissents.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Fleischman's order that: (1) did not award additional temporary disability benefits commencing May 8, 2014; and (2) found that the rate for claimant's temporary partial disability (TPD) benefits for September 9, 2015 through December 31, 2015, was zero. On review, the issues are temporary disability and TPD rate. We modify.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary and supplementation.

Claimant worked for many years as a truck driver. (Ex. 24-2). In 2001 and 2004, while working for different employers, he suffered work-related right shoulder injuries, including a labral tear and a partial rotator cuff tear. (*Id*.) In October 2004, he had surgery related to these conditions. (*Id*.)

From 2005 through May 2014, claimant worked for the employer as a milk truck driver, where he sustained additional right shoulder injuries. (Exs. 7A-1-3, 24-2; Tr. 24-26). In 2010, he slipped and fell at work. (Ex. 24-2). The employer accepted a right rotator cuff tear and claimant had another right shoulder surgery. (*Id*.) In 2013, claimant slipped and hung by his arms from a tank trailer. (Exs. 7A-2, 24-2). He submitted an injury claim for the 2013 incident, but it was denied as untimely. (*Id*.) Claimant did not request a hearing and that denial became final.

In April 2014, claimant sought treatment from Dr. Pederson, an occupational medicine physician. (Ex. AB). Dr. Pederson noted worsening right shoulder pain and ordered an MRI. (Ex. AB-1-2). He instructed claimant to return for a follow-up appointment after the MRI results. (Ex. AB-2).

A May 6, 2014, MRI report identified a recurrent, right supraspinatus tear, a partial tear of the right subscapularis insertion site, and a subluxed biceps tendon. (Ex. AC-1).

On May 8, 2014, Dr. Kovacevic reviewed the MRI report and examined claimant because Dr. Pederson was unavailable. (Ex. AD). Dr. Kovacevic noted that the MRI report had identified a right supraspinatus tear, a partial tear of the right subscapularis, and subluxation of the right biceps tendon. (*Id*.) He recorded right shoulder pain and acromioclavicular (AC) joint tenderness, diagnosed a recurrent right rotator cuff tear, and referred claimant to an orthopedist. (*Id*.) In addition, Dr. Kovacevic stated that there may be a chronic component to claimant's conditions. (*Id*.) Finally, Dr. Kovacevic opined that claimant was unable to perform his commercial driving duties and restricted him to modified duties, without an end date. (*Id*.)

In June 2014, claimant returned to Dr. Pederson, who noted right shoulder pain and tenderness, and diagnosed a right rotator cuff tear. (Ex. AE-1). In addition, he restricted claimant to modified work, without an end date. (Ex. AE-1-2).

A few days later, Dr. Vela, an orthopedist, recommended a right shoulder arthroscopy with an open repair, biceps tenodesis, and an AC joint resection. (Ex. AF-3).

In 2015, claimant worked for five employers. (Ex. 1-1-6; Tr. 32, 35-39). He earned $5,009.11 that year, comprised of varying amounts between the employers, ranging from $188.50 to $1,469.80.[1] (Exs. 1-1-6, 23A; Tr. 32, 35-39).

In April 2015, claimant began treating with Dr. Butters, an orthopedist. (Ex. 2). Dr. Butters reviewed the May 2014 MRI report and diagnosed a rotator cuff tear. (Ex. 2-1). He recommended a right shoulder arthroscopy with open repair, biceps tenodesis, and resection of the distal clavicle. (Ex. 2-4).

In June 2015, Dr. Butters diagnosed a recurrent rotator cuff tear and biceps dislocation. (Ex. 5-1). He performed a right shoulder arthroscopy, a subacromial decompression, biceps tenodesis, and an open distal clavicle resection. (*Id*.)

[1] Claimant owned one of the entities with his spouse. (Ex. 23A; Tr. 26-32). That business's net profit for 2015 was $1,620, 75 percent of which was attributed to claimant, totaling $1,215. (Exs. 1-1-2, 23A).

On August 3, 2015, Dr. Butters opined that claimant's occupational exposure as a milk truck driver, including multiple work injury events, were the major contributing cause of his right shoulder conditions. (Ex. 7A-4).

On August 13, 2015, claimant filed an occupational disease claim for a right supraspinatus tendon tear, a partial tear of the subscapularis insertion site, and a dislocation of the right biceps tendon. (Ex. 8-1).

On September 23, 2015, Dr. Butters restricted claimant to modified work. (Ex. 10). Five days later, Dr. Butters stated that claimant was restricted to modified work backdating to June 23, 2015. (Ex. 11).

In October 2015, the employer denied claimant's occupational disease claim. (Ex. 12-1). Claimant requested a hearing.

In March 2016, Dr. Butters clarified his opinion. (Ex. 24-3). He stated that work-related injuries in 2001, 2004, 2010, and 2013, were the major contributing cause of claimant's right shoulder conditions. (Ex. 24-3-5).

In June 2016, a prior ALJ's order found that claimant's occupational disease claim was not compensable because the record did not establish that "general work activities" contributed to the occupational disease. (Ex. 21A-8). Claimant requested Board review.

In March 2017, the Board affirmed the ALJ's order. (Ex. 21B-4-5); *Randy G. Simi*, 69 Van Natta 364, 367 (2017). In doing so, the Board stated that Dr. Butters's opinion that several work injuries contributed to claimant's right shoulder conditions was insufficient to establish that his "general work activities" had contributed to his conditions. (Ex. 21B-4); *Simi*, 69 Van Natta at 367. Claimant requested judicial review.

In October 2019, the court reversed and remanded to the Board for reconsideration. *Simi v. LTD Inc.*, 300 Or App 258, 266 (2019). Reasoning that work-related injuries are themselves "employment conditions" under ORS 656.802(2)(a), the court held that the Board erred in determining that claimant was required to prove that his "general work activities" contributed to his conditions. *Id*. at 264. In addition, the court stated that the record included medical evidence from which a factfinder could find that claimant's cumulative work-related injuries caused a separate medical condition requiring surgery. *Id*. at 265.

In June 2021, on remand, the Board found that Dr. Butters's opinion persuasively established that claimant's work-related injuries in 2001, 2004, 2010, and 2013, were the major contributing cause of his occupational disease.[2] (Ex. 24-5-6); *Randy G. Simi*, 73 Van Natta 526, 529-31 (2021). In addition, the Board stated that Dr. Butters's opinion supported a conclusion that claimant's overall right shoulder pathology resulted from multiple work-related injuries over time, in which the tears progressed and recurred with time and further injuries. (Ex. 24-6); *Simi*, 73 Van Natta at 531. Accordingly, the Board set aside the employer's denial. (Ex. 24-10); *Simi*, 73 Van Natta at 535.

In October 2021, the employer accepted claimant's occupational disease claim for a right supraspinatus tear, a partial tear of the right subscapularis insertion site, and a dislocation of the right biceps tendon. (Ex. 25-1).

In January 2022, claimant requested a hearing, seeking ongoing temporary disability benefits beginning May 8, 2014. (Hearing File).

CONCLUSIONS OF LAW AND OPINION

The ALJ found that claimant was not entitled to ongoing temporary disability benefits beginning May 8, 2014, because Dr. Kovacevic's May 8, 2014, temporary disability authorization did not pertain to claimant's occupational disease. Rather, the ALJ concluded that claimant was entitled to temporary disability benefits beginning September 9, 2015, based on Dr. Butters's September 23, 2015, authorization.[3] *See* ORS 656.262(4)(g).

On review, claimant seeks temporary disability benefits beginning May 8, 2014. Based on the following reasoning, we grant claimant's request.

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[2] Claimant also experienced increased shoulder pain when removing tire chains in February 2014. (Ex. 24-2). However, because Dr. Butters stated that the 2014 activity contributed only to claimant's "symptoms" and "pain" (and not the conditions/diseases themselves), the record did not support the compensability of the occupational disease. *See Simi*, 73 Van Natta at 530 n 4; citing ORS 656.802(2)(a); *Brenda Y. Allen*, 68 Van Natta 2008, 2011 (2016) ("To prove compensability of her claim as an occupational disease, claimant must prove that her employment conditions were the major contributing cause of the disease itself and not just symptoms.")

[3] The ALJ issued an Order on Reconsideration that republished the ALJ's Opinion and Order, as supplemented and modified by the Order on Reconsideration. Because the Order on Reconsideration did not address the penalty or penalty-related attorney fee issues, the ALJ's reconsideration order did not alter the ALJ's previous penalty or penalty-related attorney fee awards.

Claimant has the burden of establishing the nature and extent of his disability. *See* ORS 656.266(1); *Lisa M. Guerrero*, 62 Van Natta 1805, 1821 (2010). Temporary disability benefits are due and payable only for those periods authorized by an attending physician or nurse practitioner. *See* ORS 656.262(4)(g), (h); *Ryan Marchand*, 74 Van Natta 179, 182 (2022). The temporary disability authorization must relate at least in part to the compensable or accepted condition or disease. *See* ORS 656.262(4)(d); *Patsy M. Medeiros*, 72 Van Natta 1045, 1047 (2020); *Karla R. Olsen-Smith*, 69 Van Natta 541, 543 (2017).

Here, Dr. Kovacevic was claimant's attending physician in May 2014. Specifically, Dr. Kovacevic reviewed the May 2014 MRI report, conducted a physical examination, referred claimant to an orthopedist, and authorized work restrictions. (Ex. AD). In addition, Dr. Pederson continued authorizing modified work, consistent with Dr. Kovacevic's restrictions. (Exs. AD, AE-1). Under these particular circumstances, the record supports a conclusion that Dr. Kovacevic was primarily responsible for the treatment of claimant's compensable injury in May 2014. *See Marina V. Nozdrin*, 58 Van Natta 2953, 2955 (2006) (where an associate of an attending physician examined the claimant in the attending physician's absence, the associate was primarily responsible for the treatment of the claimant's compensable injury and served as the attending physician).

Further, on May 8, 2014, Dr. Kovacevic restricted claimant to modified work without an end date. (Ex. AD). He did so based on the May 6, 2014, MRI report that had identified a right supraspinatus tear, a partial tear of the right subscapularis, and subluxation of the right biceps tendon. (Exs. AC, AD). These conditions identified by Dr. Kovacevic were the same conditions that the employer later accepted as claimant's occupational disease claim. (Exs. AC, AD, 25-1). In addition, at the time of Dr. Kovacevic's May 8, 2014, authorization, all of the work-related injuries comprising the compensable occupational disease (2001, 2004, 2010, and 2013) had already occurred. *See Simi*, 73 Van Natta at 527, 530. Under such circumstances, we find that the record persuasively establishes that Dr. Kovacevic's May 8, 2014, authorization of work restrictions related in part to claimant's accepted occupational disease. *See Olsen-Smith*, 69 Van Natta at 543-44 (the claimant was entitled to temporary disability benefits where the authorization related in part to an accepted bilateral lateral epicondylitis condition); *Vincent O. Robison*, 67 Van Natta 938, 939 (2015) (temporary disability benefits awarded when attending physician's authorization related in part to an accepted conjunctivitis condition).

Consequently, based on Dr. Kovacevic's May 8, 2014, authorization, which was open-ended, claimant is entitled to temporary disability benefits from May 8, 2014, until such benefits can be lawfully terminated. *See Marchand*, 74 Van Natta at 184 (the claimant was entitled to ongoing temporary disability benefits where an attending physician's temporary disability authorization was open-ended and no subsequent attending physician ended the open-ended authorization).

Citing *Simi v. LTD Inc.*, 300 Or App 258 (2019), and *Randy G. Simi*, 73 Van Natta 526 (2021), the employer contends that Dr. Kovacevic's May 2014 authorization did not relate to claimant's occupational disease because the disease did not exist until Dr. Butters treated claimant in 2015. However, Dr. Butters did not opine that claimant's occupational disease started in 2015 or that it did not exist in May 2014. (Exs. 7A; 24-2-6). In addition, neither the court nor the Board made such a finding. *See Simi*, 300 Or App at 259-65; *Simi*, 73 Van Natta at 527-31. Although the Board referenced a 2015 right shoulder pathology, 2015 was simply when Dr. Butters began treating claimant's conditions. (Ex. 2); *see Simi*, 73 Van Natta at 527-30. Moreover, the Board's ultimate holding was that "Dr. Butters's opinion persuasively establishes that the work-related injuries were the major contributing cause of the claimed right shoulder conditions." *Simi*, 73 Van Natta at 531. These "claimed right shoulder conditions" comprising the compensable occupational disease claim were the same right shoulder conditions identified in the May 2014 MRI that formed the basis of Dr. Kovacevic's May 2014 authorization. (Exs. AD, 25-1).

The employer argues that Dr. Kovacevic's authorization did not relate to the occupational disease because he did not reference "a disease," whereas Dr. Butters specifically treated the disease. Although Dr. Kovacevic did not expressly reference "a disease," he stated that there may have been chronic components to claimant's right shoulder conditions. (Ex. AD) Further, Dr. Butters's chart notes did not mention "a disease," but, rather, the recurrent right shoulder tear, biceps subluxation, and the same 2014 MRI report on which Dr. Kovacevic based his May 2014 authorization. (Exs. 2-1, 4-1). Under such circumstances, we decline to disregard Dr. Kovacevic's authorization for not specifically mentioning "a disease." *See Olsen-Smith*, 69 Van Natta at 543-44; *Octavio Negrete*, 69 Van Natta 87, 88 (2017) (the claimant was entitled to temporary disability benefits regardless of whether the condition had been specifically diagnosed at the time of the physician's authorization because the authorization partially related, in fact, to the condition that was eventually accepted).

Referencing *SAIF v. Hanscam*, 246 Or App 355 (2011), and *Reynoldson v. Multnomah County*, 189 Or App 327 (2003), the employer argues that a "date of injury" analysis applies and that claimant is not entitled to temporary disability benefits beginning May 8, 2014. However, these cases are inapposite. In *Hanscam* and *Reynoldson*, the court analyzed ORS 656.202(2), which provides that the laws regarding the payment of compensation in effect at the time of injury apply. 246 Or App at 358-63; 189 Or App at 329-32. The court applied an ORS 656.202(2) "date of injury" analysis for purposes of determining the applicable permanent partial disability (PPD) rate in effect at the time the injury occurred. 246 Or App at 357; 189 Or App at 329-30. Neither case applied an ORS 656.202(2) "date of injury" analysis to a physician's temporary disability authorization, as the employer advances here. *Hanscam*, 246 Or App at 358-63; *Reynoldson*, 189 Or App at 329-32.

Here, unlike in *Hanscam* and *Reynoldson*, a ORS 656.202(2) "date of injury" analysis does not apply. The issue is not the applicable PPD rate or which version of an administrative rule to apply, but, rather, whether Dr. Kovacevic's temporary disability authorization related in part to claimant's accepted occupational disease. We find that it did for the reasons stated above. *See Olsen-Smith*, 69 Van Natta at 543-44; *Negrete*, 69 Van Natta at 88.

We turn to the TPD rate issue. Pursuant to ORS 656.268(4)(a), when a worker returns to regular or modified employment, temporary total disability benefits cease and the worker may be entitled to TPD benefits. *See SAIF v. Vivanco*, 216 Or App 210, 217 (2007). If the worker begins employment with a new employer, it is the worker's responsibility to provide evidence of the amount of wages earned with the new employer. *See* OAR 436-060-0030(3);[4] *Mir Iliaifar*, 57 Van Natta 1913, 1915 (2005), *aff'd*, 217 Or App 104 (2007). If the worker fails

[4] The applicable version of the rule is OAR 436-060-0030(3) (WCD Admin. Order 11-052, eff. April 1, 2011). OAR 436-060-0030(3) provides, in relevant part:

> "An insurer shall cease paying temporary total disability compensation and start paying temporary partial disability compensation under section (1) from the date an injured worker begins wage earning employment, prior to claim closure, unless the worker refuses modified work under ORS 656.268(4)(c)(A) through (F). If the worker is with a new employer and upon request of the insurer to provide wage information, it shall be the worker's responsibility to provide documented evidence of the amount of any wages being earned. Failure to do so shall be cause for the insurer to assume that post-injury wages are the same as or higher than the worker's wages at time of injury."

to do so, the carrier can assume that the worker's post-injury wages were the same or higher than the worker's wages at the time of injury. *See* OAR 436-060-0030(3); *Seco O. Casares*, 51 Van Natta 1237, 1237 (1990), *aff'd without opinion*, 167 Or App 259 (2000) (temporary disability rate calculated at zero when the claimant presented no evidence that post-injury wages were less than at-injury wages). It is the worker's burden to overcome this assumption. *See Iliaifar*, 57 Van Natta at 1915.

Here, we find that claimant has overcome the assumption that his wages from September 9, 2015 through December 31, 2015, were the same or higher than his wages at the time of injury. We reason as follows.

It is undisputed that claimant's yearly wage at injury was $60,858.72, based on an average weekly wage of $1,170.36. In addition, the record establishes that claimant earned $5,009.11 in 2015 (well below his yearly wage at injury). (Exs. 1-1-6, 23A; Tr. 32, 36-39). Therefore, even assuming that he earned the entire $5,009.11 from September 9, 2015 through December 31, 2015, the wage amount for that period is less than his $60,858.72 yearly wage at injury (prorated). Under such circumstances, we find that claimant has overcome the assumption that his wages for September 9, 2015 through December 31, 2015, were the same or higher than his wages at injury.[5] *See Iliaifar*, 57 Van Natta at 1916 (the claimant overcame the assumption that his post-injury wages were the same or higher than his at-injury wages based on testimony, tax information, and bank statements).

The employer contends that the record lacks unemployment and wage records for 2015. However, claimant testified, without rebuttal, that he received unemployment compensation in 2014 (not 2015). (Tr. 48-49). Further, the record includes the tax records for each of the employers claimant worked for in 2015. (Ex. 1-1-6; Tr. 32, 35-39). Under such circumstances, we decline to assume that claimant's post-injury wages for September 9, 2015 through December 31, 2015, were the same or higher than his at-injury wages.[6] *See Iliaifar*, 57 Van Natta at 1916.

[5] In reaching the above conclusion, we distinguish *Casares*, 51 Van Natta at 1237, in which the TPD rate was calculated at zero because the claimant presented *no* evidence that his post-injury wages were less than his at-injury wages. Here, unlike in *Casares*, the record includes claimant's tax/earning documentation for 2015 and testimonial evidence regarding claimant's 2015 employers. (Exs. 1-1-6, 23A; Tr. 32, 35-39).

[6] In addition, OAR 436-060-0030(3) provides that a worker's failure to provide documented evidence of the amount of wages being earned "shall be cause for the insurer to assume that post-injury wages are the same as or higher than the worker's wages at time of injury." Here, claimant did not fail to

Consequently, we modify the ALJ's TPD rate decision. In lieu of the ALJ's conclusion that claimant's TPD rate for September 9, 2015 through December 31, 2015, was zero, the employer shall recalculate claimant's TPD rate, which necessarily includes (but is not limited to) any wages he received during the relevant periods from other employers that have been presented in this record.

Finally, claimant's counsel is entitled to an assessed fee for services at the hearing level and on review regarding the additional temporary disability and TPD rate issues. ORS 656.383(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services at the hearing level and on review concerning these issues is $13,000, payable by the employer.[7] In reaching this conclusion, we have particularly considered the time devoted to issues (as represented by the record, claimant's counsel's fee submission at the hearing level, the employer's objection at the hearing level, claimant's appellant's briefs, and his counsel's uncontested fee submission on review), the complexity of the issues, the value of the interest involved, the benefit secured, the risk that claimant's counsel might go uncompensated, and the contingent nature of the practice of workers' compensation law.

ORDER

The ALJ's order dated February 28, 2022, as reconsidered on April 22, 2022, is modified. In addition to the ALJ's temporary disability award, claimant is awarded temporary disability benefits from May 8, 2014 through September 8, 2015. In lieu of the ALJ's TPD rate calculation for September 9, 2015 through December 31, 2015, the employer is directed to recalculate claimant's TPD rate in the manner described in this order. For services at the hearing level and on review regarding the additional temporary disability and TPD rate issues, pursuant to ORS 656.383(2), claimant's counsel is awarded a reasonable attorney fee of $13,000, to be paid by the employer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on May 11, 2023

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provide documented evidence of his 2015 wages (the condition precedent for the assumption to apply). *See* OAR 436-060-0030(3). Rather, he provided tax/earning documentation for all five of his 2015 employers. (Ex. 1-1-6).

[7] This fee is awarded in addition to the ALJ's attorney fee award of $9,000 pursuant to ORS 656.383(2).

Member Curey, dissenting.

The majority concludes that claimant is entitled to temporary disability benefits beginning May 8, 2014, and that claimant has overcome the assumption that his wages for September 9, 2015 through December 31, 2015, were the same or higher than his wages at injury. Because I disagree with those conclusions, I respectfully dissent.

Claimant has the burden of establishing the nature and extent of his disability. *See* ORS 656.266(1); *Lisa M. Guerrero*, 62 Van Natta 1805, 1821 (2010). Temporary disability benefits are due and payable only for those periods authorized by an attending physician or nurse practitioner. *See* ORS 656.262(4)(g), (h); *Ryan Marchand*, 74 Van Natta 179, 182 (2022). The benefits of a worker who incurs an occupational disease are based on the wage of the worker at the time of medical verification of the worker's inability to work because of the disability caused by the occupational disease. *See* ORS 656.210(2)(d)(B); OAR 436-060-0025(1).[8]

A claimant's "date of injury" for an occupational disease is the date of disability from the disease or the date of the first medical treatment of the disease, whichever is earlier. *See Reynoldson v. Multnomah County*, 189 Or App 327, 332-33 (2003). The date of injury is the point at which the disease *occurs*, not the point at which the last exposure to the disease-causing agents or condition occurs. *See Reynoldson*, 189 Or App at 331-32.

Here, I find that claimant's occupational disease occurred in 2015. Therefore, because Dr. Kovacevic's May 2014 work restrictions (the work restrictions relied on by the majority) preceded claimant's 2015 date of injury, those restrictions could not have authorized claimant's inability to work due to disability caused by the 2015 occupational disease. *See* ORS 656.210(2)(d)(B); OAR 436-060-0025(1). I reason as follows.

In *Simi v. LTI Inc.*, 300 Or App 258, 265 (2019), the court addressed the compensability of claimant's occupational disease. Specifically, the court stated that the record included evidence that claimant's work-related injuries caused a separate medical condition that developed gradually as the result of the cumulative effect of the work-related injuries. In addition, as stated in the ALJ's order, the

[8] The applicable version of the rule is OAR 436-060-0025(1) (WCD Admin. Order 11-052, eff. April 1, 2011).

court's language in *Simi* supports a conclusion that it is not the disability due to the injuries that make up the occupational disease that determines claimant's disability status, but, rather, the inability to work related to the separate occupational disease. 300 Or App at 265.

On remand, in *Randy G. Simi*, 73 Van Natta 526, 530-31 (2021), the Board found that Dr. Butters's opinion persuasively established that the multiple work-related injuries caused "the overall shoulder pathology treated in 2015." Thus, consistent with the court's understanding that claimant's occupational disease claim was comprised of work-related injuries culminating in a separate medical condition (the current occupational disease claim), the Board's interpretation of Dr. Butter's opinion supports a conclusion that the separate, now compensable, occupational disease did not occur until 2015. *Id*. Therefore, the majority's opinion that claimant is entitled to temporary disability benefits in 2014 is inconsistent with the Board's order in *Randy G. Simi*, 73 Van Natta 526 (2021).

Claimant argues and the majority concludes that on May 8, 2014, Dr. Kovacevic authorized temporary disability benefits for claimant's occupational disease. However, as reasoned above, claimant's 2015 occupational disease had not yet occurred at the time of Dr. Kovacevic's 2014 work restrictions. (Ex. AD); *Simi*, 73 Van Natta at 530-31; *see Reynoldson*, 189 Or App at 331-32 (the occupational disease date of injury is the point at which the disease occurs, not the point at which the last exposure to the disease-causing agents or condition occurs). Therefore, Dr. Kovacevic's 2014 work restrictions could not have authorized claimant's inability to work because of disability caused by the 2015 occupational disease, as required by ORS 656.210(2)(d)(B) and OAR 436-060-0025(1). In addition, contrary to the majority's assertion, Dr. Kovacevic's 2014 work restrictions did not reference an occupational disease, but, rather, a discrete December 9, 2013, work incident, in which claimant slipped on ice at work. (Exs. AD, AE-2; Tr. 33-34).

Moreover, Dr. Kovacevic was not claimant's attending physician for purposes of the now compensable 2015 occupational disease. Specifically, because the 2015 occupational disease had not yet occurred, Dr. Kovacevic could not have been primarily responsible for its treatment in May 2014. (Ex. AD); *see* ORS 656.005(12)(b) (an "attending physician" is a doctor or physician who is primarily responsible for the treatment of a worker's compensable injury). Thus, Dr. Kovacevic did not have the statutory authority under a compensable Oregon occupational disease claim to authorize temporary disability benefits for claimant's now compensable 2015 occupational disease. *See* ORS 656.262(4) (g), (h); ORS 656.245(2)(b)(B).

Under such circumstances, I find that claimant is not entitled to temporary benefits from May 8, 2014 through September 8, 2015. *See* ORS 656.210(2)(d)(B); OAR 436-060-0025(1).

Rather, as set forth in the ALJ's order, Dr. Butters was the first attending physician in the record to authorize the inability to work related to the separate 2015 occupational disease. (Exs. 8-1, 10); *see* ORS 656.210(2)(d)(B); OAR 436-060-0025(1). Specifically, on September 23, 2015, Dr. Butters restricted claimant to modified work from June 23, 2015 to September 23, 2015. (Exs. 8-1, 10). However, no authorization can retroactively authorize temporary disability benefits more than 14 days prior to its issuance. *See* ORS 656.262(4)(g). Consequently, Dr. Butters's September 23, 2015, authorization is retroactive to September 9, 2015 (14 days before the authorization). *Id.* Under such circumstances, like the ALJ, I find that claimant is entitled to temporary disability benefits beginning September 9, 2015, based on Dr. Butters's September 23, 2015, authorization. *See* ORS 656.210(2)(d)(B); OAR 436-060-0025(1).

I turn to the temporary partial disability (TPD) rate issue. Pursuant to ORS 656.268(4)(a), when a worker returns to regular or modified employment, temporary total disability benefits cease and the worker may be entitled to TPD benefits. *See SAIF v. Vivanco*, 216 Or App 210, 217 (2007). If the worker begins employment with a new employer, it is the worker's responsibility to provide evidence of the amount of wages earned with the new employer. *See* OAR 436-060-0030(3); *Mir Iliaifar*, 57 Van Natta 1913, 1915 (2005), *aff'd*, 217 Or App 104 (2007). If the worker fails to do so, the carrier can assume that the worker's post-injury wages were the same or higher than the worker's wages at the time of injury. *See* OAR 436-060-0030(3); *Seco O. Casares*, 51 Van Natta 1237, 1237 (1990), *aff'd without opinion*, 167 Or App 259 (2000) (temporary disability rate calculated at zero when the claimant presented no evidence that post-injury wages were less than at-injury wages). It is the worker's burden to overcome this assumption. *See Iliaifar*, 57 Van Natta at 1915.

Here, although the record includes the 2015 tax information for five different employers, claimant has not established which employer, if any, he was working for from September 9, 2015 through December 31, 2015. (Exs. 1-1-6, 23A; Tr. 32, 36-39). In addition, the record does not persuasively establish the amount of claimant's wages, if any, from September 9, 2015 through December 31, 2015. (Exs. 1-1-6, 23A; Tr. 32, 36-39). Under such circumstances, I find that claimant has not met his burden to overcome the assumption that his wages from

September 9, 2015 through December 31, 2015, were the same or higher than his wages at the time of injury. *See* OAR 436-060-0030(3); *Iliaifar*, 57 Van Natta at 1915; *Casares*, 51 Van Natta at 1237.

Consequently, for the aforementioned reasons, I find that claimant's TPD rate for September 9, 2015 through December 31, 2015, was zero. *See* OAR 436-060-0030(3); *Casares*, 51 Van Natta at 1237; *Iliaifar*, 57 Van Natta at 1915. Because the majority concludes otherwise, I respectfully dissent.